learned president after watching the demonstration given by the appellant as to how P.W. 1 had placed the money in his pocket, concluded that it was absolutely impossible for the appellant's right hand to contact anthracene in that manner and that the presence of anthracene in his pocket implied that the money must have come into contact with the inner lining of the pocket. In the case for the prosecution, what actually transpired depended solely on the evidence of P.W. 1 alone, namely, that he handed the notes to the appellant who took them and put them in his pocket. The learned president should have considered that P.W. 1 had handled the notes earlier when he received them from P.W. 6 and put them in his shirt pocket before he drove to the appellant's house, in which case his right hand at least came into contact with anthracene. There was evidence that both P.W. 1 and the appellant were seen sitting near each other on the porch talking and in the ordinary course of conversation P.W. 1 could have touched the appellant without either of them being conscious of it. Again, considering the position in which the appellant was standing near his car with one hand on the hood of the car, the money could have in all probability gone much deeper into his pocket than expected, and that when he held P.W. 1's hand, as he stated in his evidence and in his report, his hand too could have contacted anthracene. On the spur of the moment when an unexpected incident happened, it would not be reasonable to expect the appellant to remember every detail that had taken place even though he was a police officer. In addition, there was the explanation by the appellant that before he cleaned his car he took out the steel bangle from his hand as used to be his practice before washing his car in order not to scratch the paint and put it in his right shorts pocket. After cleaning his car he took it out and put it on again. His evidence in rebuttal was consistent with his police report which might afford some ground for believing him. The cautioned statement made by him to the police was never put in by the prosecution to impeach his credit under section 15(1) of the Act. Again, there was the evidence of the assistant controller of telecoms., Seremban, (D.W. 2) who stated he was aware that sometimes telephone calls in Port Dickson could not get through either because the number dialled was engaged or due to faults. He also confirmed that the peak hours were between 6.30 p.m. and 9.30 p.m. It must be noted that the time of the alleged incident when P.W. 1 claimed that he handed the money to the appellant was at 7.30 p.m. Immediately after this, according to the appellant, he dialled the police station in order to lodge a report but could not get through. In the circumstances, it was for the learned president to consider whether the defence has "disproved" the prosecution evidence within the meaning laid down by the Privy Council in *Public Prosecutor* v. *Yuvaraj*,[17] *i.e.* that the defence is not required to prove with exceptional degree of certainty as excludes all reasonable doubt that the fact does not exist, and it is sufficient if the court considers that upon the evidence before it, it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings, *i.e.* the balance of probabilities. In this regard, there was no difference with the defence of rebutting the presumption of corruption, as being reasonable and probable.

Taking into consideration the evidence of the appellant and that of D.W. 2, and in the light of the various irregularities in the prosecution case as discussed earlier, I am of the view that, with respect to the learned president, he has failed to consider the defence adequately in accordance with the accepted principles.

I therefore allow the appeal, set aside the conviction and quash the sentence. The fine, if paid, shall be refunded to the appellant.

Appeal allowed.

Solicitors: *Joseph & Son.*

SAFETY INSURANCE CO. LTD. v. WONG CHOO YONG

[F.C. (Ong C.J. (Malaya), Gill and Ali F.JJ.)
November 6 and December 24, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. 75 of 1970]

Practice and Procedure — Application for extension of time to file record of appeal — Reasons for application inadequate — Nothing said about merits of appeal.

The appellants had applied for extension of time to file their notice of appeal. The reason for the extension as stated in the affidavit in support of the application was that the appellants' solicitor was unable to file the record of appeal in time as although he had received the notes of evidence he had not received copies of certain exhibits which were to be included in the record of appeal. The affidavit did not say anything about the merits of the appeal.

Held: (1) the appellants had failed to show why they had not applied for copies of the exhibits from the proper quarter if their inclusion in the appeal record was considered absolutely necessary and in this case they could have filed the appeal record without the exhibits and have applied for the inclusion of the exhibits in the record at the time of hearing of the appeal;

(2) in any event nothing had been said about the merits of the appeal in the affidavit in support of the application and therefore the application must be dismissed.

Case referred to:-

(1) *Ceylon Motor Insurance Association* v. *Thambugala* [1953] 2 All E.R. 870.

FEDERAL COURT.

James Lau Tiong Jin on behalf of *K. E. Hilborne* for the appellants.

H. L. Wrigglesworth for the respondent.

The following judgment was delivered on November 6, 1970:

Gill F.J.: The appellants were the insurers of a motor lorry which on 8th July 1963 knocked down the respondent from his motor-cycle, thereby causing him very serious injuries. On 13th June 1966 the respondent obtained judgment against the driver and owner of the said motor lorry in civil suit No. 20 of 1965 in the High Court at Kuala Trengganu for a sum of $35,200 as general damages, $815 as special damages and costs, which were later taxed at $3,052.63 with interest thereon

at 6% per annum from the date of the judgment. As the driver and owner of the motor lorry and the appellants as insurers failed to make any payment under the said judgment, the respondent instituted proceedings against the appellants in the same High Court in civil suit No. 96 of 1966. On 24th May 1970 Ibrahim J. gave judgment against the appellants for a sum of $47,817 and costs to be taxed.

The appellants filed a notice of appeal on 23rd June 1970. By his letter dated 9th July 1970 the Chief Registrar of this court informed the solicitors for the appellants that the record of appeal was required to be filed in the Registry of the High Court at Kuala Trengganu on or before 4th August 1970. A certified copy of the notes of evidence taken at the trial of the action was received by the solicitors for the appellants on or about 30th July 1970. They had presumably received a copy of the judgment some time earlier. Thus they still had four days within which to file their record of appeal, but they failed to do so.

On 24th August 1970 the solicitors for the appellants took out a notice of motion for extension of time to file their record of appeal. This came up for hearing before us on 6th October, 1970. In his affidavit in support of the motion for extension of time Mr. K. E. Hilborne, solicitor for the appellants, stated that the reason for his inability to file the record of appeal in time was that, when he received the notes of evidence, he had not received copies of certain exhibits which were to be included in the record of appeal. He went on to say in the affidavit that on 31st July 1970 he wrote to Messrs. Wrigglesworth & Co., the solicitors for the respondent, for the said exhibits and that he was informed that they were not in their possession, with the result that on 3rd August 1970 he had to write for copies of them to the Assistant Registrar, High Court, Kuala Trengganu who by his letter dated 5th August 1970 replied to say that copies would be supplied to him on payment of a fee of $4.50. By the time he received this letter he was, of course, out of time for filing the record of appeal.

It is to be observed that the respondent had brought his action against the appellants as insurers by virtue of the provisions of section 80(1) of the Road Traffic Ordinance under which an insurer is liable to satisfy any judgment against persons insured in respect of third party risks, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy of insurance. Section 82(2) of the Ordinance mentions certain circumstances under which the insurers are not bound to satisfy such judgment.

In his affidavit Mr. Hilborne said not a word about the merits of the appeal. As regards copies of exhibits, there was no mention in the affidavit as to when the application for a copy of the notes of evidence was made and whether copies of the exhibits were also asked for at the same time. It was also not clear why a request was made to the solicitors for the respondent for copies of these exhibits, even if they were exhibits which were put in by the respondent. They were obviously documentary exhibits, and one is entitled to assume that counsel for both parties had copies of them when they were put in. Nor was there any explanation as to why no request for copies of them was made at the same time as the request for the notes of evidence, if in fact there had been an omission to do so.

The application for extension of time was strenuously opposed by Mr. Wrigglesworth, counsel for the respondent, his main argument being that the appellants had put up a trivial excuse for not filing the record of appeal in time. He had filed an affidavit in which he had set out his reasons why the application should not be granted. The main reasons given by him were that the respondent had suffered great hardship as a result of his earning capacity having been seriously affected by the injuries which he had received seven years earlier, and that no compensation whatsoever had been received by him either from the driver or owner of the lorry or from the appellants during the whole of that period in spite of his having obtained judgment against all three of them. He went on to say in his affidavit that he had carefully studied the judgment of the learned trial judge which closely followed the judgment of the Privy Council in *Ceylon Motor Insurance Association, Ltd.* v. *Thambugala*,[1] and that there were no merits in the appeal.

A junior counsel who appeared on behalf of Mr. Hilborne at the hearing of the application said in reply to Mr. Wrigglesworth that he had no further instructions. In the circumstances, we had to decide the application on the affidavits filed and on what had been urged by Mr. Wrigglesworth in opposing the application. As I have already stated, the appellants had failed to show cause why they had not applied in time for copies of the exhibits to the right quarter if their inclusion in the appeal record was considered absolutely necessary. In our judgment, it would have been quite proper for them to have filed the appeal record without the exhibits and to have applied for the inclusion of the exhibits in the record at the time of the hearing of the appeal. This has been generally done in many previous cases without serious opposition from the other party. We were, therefore, of the opinion that the appellants were not entitled to any indulgence on the part of this court to grant them extension of time. A more serious ground for refusing the application was that nothing had been said about the merits of the appeal. That was our other reason for refusing to exercise our discretion in favour of the appellants.

For these reasons, we dismissed the application with costs.

The following judgment was delivered on December 24, 1970:

Ong C.J. (Malaya): On October 6, 1970 this court dismissed the appellant's application for extension of time within which the record of appeal should be filed. The grounds of my decision are as follows.

The respondent was severely injured in a road accident on July 8, 1963. On May 20, 1965 he commenced an action for damages in the High Court at Kuala Trengganu against the driver and owner of the lorry which ran into his motor-cycle. On June 13.

1966 he was awarded $36,015 damages and costs. Failing to recover payment from the defendants or the appellant, their insurers, the respondent brought the action the subject matter of this appeal, to enforce payment by the appellant under the provisions of section 80(1) of the Road Traffic Ordinance 1958. Mr. Hilborne, of the firm of advocates and solicitors retained by the appellant, appeared as counsel at the trial of the action which was heard on March 18 and 19, 1970. A written judgment was delivered on May 24, 1970 in favour of the respondent for $47,817 and costs. The judgment was available to the parties on application and Mr. Wrigglesworth, counsel for the respondent was able to receive, not only a copy thereof but also the notes of evidence, from the secretary to the judge on June 28, 1970. Notice of appeal had been duly filed by the appellant's solicitors on June 23, 1970 — the very last day to do so. They should have received their copy of the notes of evidence at the same time as Mr. Wrigglesworth, or, allowing for delay in the post, by June 30, 1970 at the latest — had they seen fit to apply for same upon filing the notice of appeal. The notes of evidence were of course *sine qua non* once notice of appeal was filed. The appellant's solicitors, however, did nothing about promptly applying for the notes, not even bestirring themselves after they had been informed by the Chief Registrar of this court on July 9, 1970 that the appeal record should be filed on or before August 4, 1970. Mr. Hilborne does not say in his affidavit, of August 17, 1970, whether he had applied for the notes before July 9 or, if after July 9, how long thereafter. What he stated in his affidavit of August 17, 1970 on this point was as follows: —

"4. Since the receipt of the letter from the Chief Registrar, Federal Court as aforesaid, I have received the certified copy of the notes of evidence of the said action, *on or about the 30th day of July, 1970,* but have not received the exhibits to enable me to include them in the record of appeal which is in the course of preparation."

Mr. Wrigglesworth, however, has filled the gap in our knowledge as to the diligence shown by the appellant's solicitors, by his affidavit of November 17, 1970: —

"14. I now produce a certified true copy which I have recently obtained of the letter written by Messrs. Wilson & Company on behalf of Mr. Hilborne to the secretary to the judge, Kota Bharu on 21st July, 1970 applying for a copy of the notes of evidence and grounds of judgment (but not the documentary exhibits) in the said civil suit. It also appears from an endorsement on that letter that the notes of evidence were delivered to Messrs. Wilson & Company on 25th July, 1970. A copy of the said letter is attached hereto and marked 'HLW 4'. I also produce a certified true copy of the relevant receipt for the copy of notes of evidence, a copy of which is attached hereto and marked 'HLW 5'."

The time for filing the record of appeal expired on August 4, 1970. If the notes of evidence received on July 30 showed that the record could not be completed for filing in time Gill F.J. has stated in his judgment what could readily be done in the circumstances. At least an application should have been filed before August 4 for an extension of time. Was reasonable diligence shown when the motion papers were not filed till August 24?

With all respect to learned counsel for the appellant and having seen the judgment of Ibrahim J., against which the notice of appeal was filed, I have serious doubts whether the exhibits — the absence of which was said to be the reason for the solicitors' inability to file a complete record of appeal — were necessary or even relevant. Only two issues were raised in the action. The issue of fact is no longer open to challenge. The other is a question of law and I am unable to see how the inclusion of the letter of October 10, 1963 relevant to the question was necessary when the material portion thereof was set out *verbatim* in the judgment.

In my view, the inability of the appellant's solicitors to file the appeal record in time was due solely to their own fault, for which this court should show no indulgence. There is, in my opinion, not only a lack of merit in the application, but also *ex facie* in the appeal itself.

Ali F.J. concurred.

Application dismissed.

Solicitors: *Hilborne & Co.; Wrigglesworth & Co.*

WOON MOOI HUA & ANOR. v. TAN KAY SWEE

[O.C.J. (Chang Min Tat J.) January 16, 1971]

[Ipoh — Civil Suit No. 768 of 1968]

Executors and Administrators — Accounts — Right of executors and administrators and delegatus non potest delegare — Trustees Ordinance, 1949, s. 27 — Limitation Ordinance, 1953, s. 22 — R.S.C. 1957, O. 15, r. 1, O. 30 r. 2, O. 70 r. 1.

The plaintiffs claimed as personal representatives of the estate of *TBC* for accounts and a declaration that several transfers of property belonging to the estate were procured by fraud, mistake or undue influence by the defendant, and for consequential reliefs. It was common ground that *TBC* died in 1955 and by his will appointed the first plaintiff and one *LKH*, his widows, his executrices and trustees. Probate was granted to them. *LKH* died in 1962 and in her place the second plaintiff herself also a widow of *TBC* was appointed a co-personal representative. The defendant and one *TKE* are two of *TBC's* sons. The first plaintiff and *LKH*, by two instruments, appointed the defendant and *TKE* their attorneys to administer the estate generally under the will. The powers of attorney were revoked after 10 years. The plaintiffs alleged that at no time had the defendant ever given any accounts of his management and his several dealings with the assets of the estate. The plaintiffs took out a summons in chambers for accounts.

The defendant objected to the demand for accounts on a number of grounds. He also contended that the first plaintiff and *LKH* were themselves administering the estate and charged the plaintiffs with undue haste as the summons for accounts were taken before the time agreed for delivery of the defence had expired.

Held: (1) the plaintiffs were not merely trustees. Both under the will and by the grant of probate, they had been constituted the executrices of the estate and as such the rule *delegatus non potest delegare* has no application. The defendant as a *delegatus* was an accounting party, and it was his duty to account for all his dealings. There was no preliminary point to be tried;

(2) as the action by the plaintiffs was as beneficiaries and on behalf of other beneficiaries, section 22(1)(a) and (b) of the Limitation Ordinance, 1953 applied and there was no bar to the action;

(3) whether as donor of the power and suing as such donor or whether as legal personal representative of the estate